

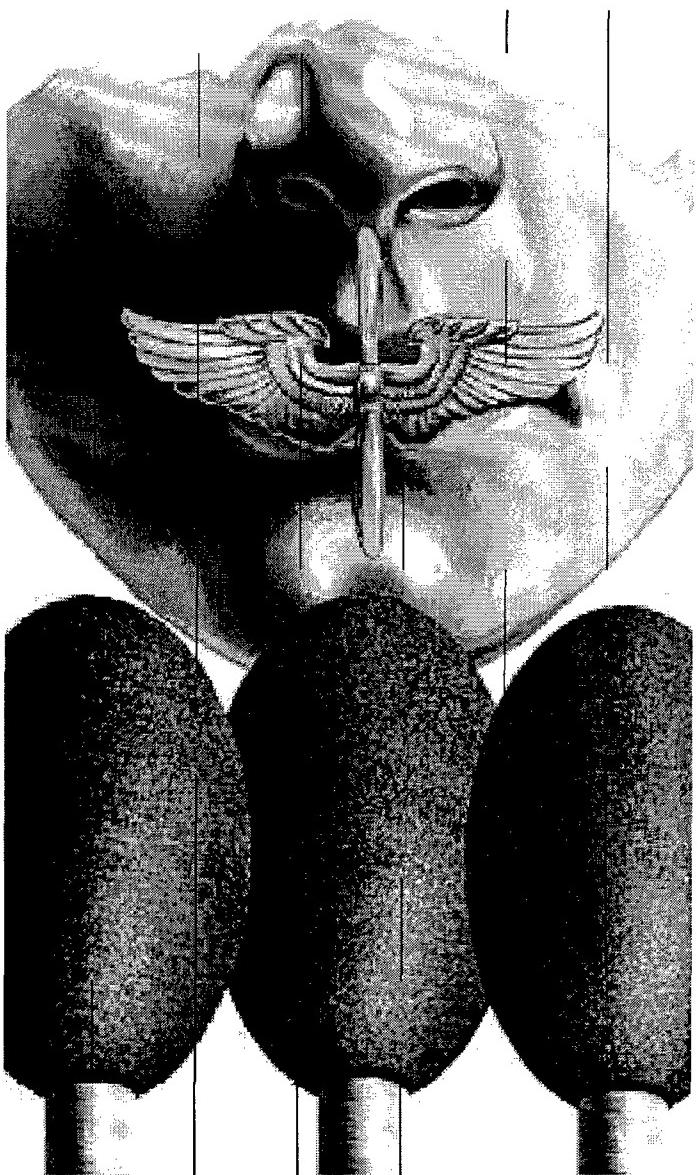
The Speech Rights of Air Professionals

COL LLOYD J. MATTHEWS, USA,
RETIRED

AMONG THE MOST sublime utterances in the rhetorical fabric of our nation's founding is Article 1 of the Bill of Rights: "Congress shall make no law . . . abridging the freedom of speech or of the press." For those American citizens wearing the uniform of our armed services, however, there have long been on the books laws passed by Congress that in practice do sanction the abridgement of speech rights of service members when military necessity so dictates.¹ Such laws flow from prudent constitutional provisions for Congress to make rules for the government and regulation of the armed forces (Art. 1, sec. 8) and for the president to act as commander in chief of those armed forces (Art. 2, sec. 2).

A serious problem ensues from the fact that in interpreting applicable law, the courts have never defined precisely how far military necessity should extend in sanctioning the infringement of speech rights guaranteed under the Bill of Rights. The courts have traditionally acted to protect operational security, and they have taken a disapproving view of soldierly speech that represents a genuine threat to good order and discipline. But the extent to which service members' speech can be censored solely for failure to conform with service or government policy—as it now frequently is—has never been confronted head-on and unambiguously resolved by the courts.²

This lack of clear limits on speech as defined by the ultimate judicial arbiters has cre-



19981201 102

DTIC QUALITY EXTRALITED 5

AQ I 99-03-0283

ated a serious problem for military professionals, since they are most knowledgeable of national defense requirements and are potentially in position to make the most authoritative and credible contributions to the national defense dialogue. Detlev Vagts has presented the classic case for allowing the military officers of democratic nations to speak their minds publicly on matters of national defense policy:

In preventing unofficial opinions from competing in the military marketplace of ideas, we grant a dangerous monopoly to official dogma that may shelter a stagnation and inefficiency we can ill afford in these swift and perilous times. By preventing independently thinking officers from speaking their piece, we encourage mental laziness; deprive the Defense Department, Congress, and voters of valuable sources of data; and threaten to reduce even further the small roster of American officers who make lasting contributions to military thought.³

Yet, despite the broad professional obligation to make their expert views known among the polity, Air Force officers remain members of the executive branch of government, a position calling into play a host of powerful but narrowly centered obligations and loyalties of its own. How to resolve the resulting tension—between the internal demands of conforming one's speech to service on the commander in chief's national defense team, and the external obligation for honesty and candor before the nation, Congress, and the citizenry—is the subject of this article.⁴

Several notable free-speech cases illustrate how air professionals of years past have grappled with the question of when and when not to speak their piece. Their experience will put us in a position to draw some useful lessons for all Air Force officers who aspire to higher rank and responsibility.

Col Billy Mitchell

With the possible exception of Gen Douglas MacArthur's embroilments with President

Harry Truman during the Korean War, Billy Mitchell presents us with the most famous free-speech case in American arms.⁵ Mitchell emerged from World War I as a bona fide national hero, having been the first American in uniform under fire on the ground and the first US officer to fly over enemy lines. Later, he conceived, planned, organized, and led the giant massed Allied aerial attack against the Germans in the Saint-Mihiel salient, employing 1,481 aircraft of 49 squadrons.

Appointed assistant chief of the Army Air Service in 1919 and promoted to brigadier general a year later, Mitchell became an indefatigable advocate of the role of air power and the need for greater independence of air forces. Working mainly within the system at first but finding his efforts thwarted by niggardly budgets and the archaic thinking of the General Staff, Mitchell gradually moved into the public arena, using letters, radio broadcasts, lectures, articles, books, congressional hearings, and dramatic operational exploits to make his case. Most spectacular of the latter were his demonstrations that warships could be destroyed by aerial bombing, as in the case of the captured German battleship *Ostfriesland* (1921) and the obsolete USS *Alabama* (1921), *New Jersey* (1923), and *Virginia* (1923).

Owing to unauthorized leaks of the results of the 1921 bombing tests against the warships, Secretary of War John Weeks ordered Mitchell to publish nothing further of military significance without prior War Department clearance. Mitchell complied for a while, but during the period December 1924 to March 1925, he published a series of five provocative articles on airpower in the *Saturday Evening Post*, having bypassed Weeks and gone for approval directly to President Calvin Coolidge, who gave a qualified OK to the undertaking.

Meanwhile, in his appearances before congressional committees, Mitchell began to ratchet up the seriousness of the charges he was making against the opposition camps in the Army and Navy, accusing them of muzzling pro-air officers, of neglecting the development of airpower, and of dishonesty in in-

terpreting test data tending to support the positions of air advocates. Finally, in March 1925 with President Coolidge's approval, Secretary Weeks relieved Mitchell from his appointment as assistant chief of the Air Service, reduced him to his permanent grade of colonel, and banished him to the hinterlands of Fort Sam Houston, Texas, in the position of corps air officer. In Texas Mitchell continued to speak out on his familiar themes, publishing a magazine article and the book *Winged Defense*, despite the fact that Weeks's strictures on his public statements were still in effect.

The precipitating event in his final downfall, however, was the disastrous crash of the Navy dirigible *Shenandoah* in September 1925. Despite such ominous factors as the prevailing fall storms over the Great Lakes, adverse prior warnings from the dirigible's skipper, and a shortage of safety valves on board, Navy authorities dispatched the dirigible on a public relations jaunt to overfly state fairs in the Midwest. The dirigible encountered violent windstorms and crashed near Sharon, Ohio, killing 13 of the crewmen, including the skipper. The press went to Mitchell immediately for a statement, and he predictably accommodated them: "My opinion is as follows: These accidents are the result of the incompetency, the criminal negligence, and the almost treasonable negligence of our national defense by the Navy and War Departments."⁶ The complete statement, full of such charges, ran to 6,080 words. Four days later, on 9 September, he made another statement to reporters, even more inflammatory than the first, if that were possible—one amounting to a direct challenge to his civilian superiors as well as military. Mitchell at last had what he admittedly had been seeking—a splashy public confrontation with the highest authorities.

President Coolidge himself ordered a general court-martial. Under Article 96 of the Articles of War (the counterpart to today's Article 134 of the Uniform Code of Military Justice [UCMJ]), authorities charged that in making the statements, Mitchell had conducted himself "to the prejudice of good or -

der and discipline," that he had been "insubordinate," and that he had been "highly contemptuous and disrespectful" toward the War and Navy Departments and intended to discredit them. Mitchell's defense rested on the arguments that his right to make the statements was protected by the First Amendment and that his allegations against the authorities were true. Both arguments failed, and he was convicted on all charges on 17 December 1925. The sentence read, "The court upon secret written ballot, two-thirds of the members present concurring, sentences the accused to be suspended from rank, command, and duty with the forfeiture of all pay and allowances for five years."⁷

Rather than accept continued service in a suspended status, Mitchell resigned from the Army on 1 February 1926 and spent his remaining years stumping for airpower. He died on 19 February 1936, only six years before the Japanese aerial attacks on Pearl Harbor and Clark Field that he had predicted in detail in 1924.

In looking to the Mitchell case for a perspective on managing their own public utterances, officers today will need to keep several basic factors in mind. Mitchell was embroiled in a singularly historic cause—the emergence of airpower—and he approached it as a crusader, an evangelist, and ultimately a martyr. Moreover, he had the saving grace to be right. In 1957 Secretary of the Air Force James Douglas was petitioned to set aside Mitchell's court-martial verdict. He properly refused, noting that Mitchell, while remaining in uniform, had in full awareness challenged military and civilian authority in an unlawful way. But Douglas went on to affirm that "our nation is deeply in his debt. . . . Colonel Mitchell's views have been vindicated."⁸

Even if we grant that extraordinary high-voltage shock treatment is sometimes necessary to jolt a conservative military establishment into acceptance of a new and historic idea, we still need to recognize that some people managed successfully to administer the necessary shock while working within the system, though they may have trod on a knife-edge at times.⁹

Maj Gen Orvil A. Anderson

General Anderson won his wings in World War I and was later accorded numerous awards for service to aviation. He distinguished himself particularly in ballooning, having in 1935 piloted the Explorer II to a new world's-record altitude of 72,395 feet.

In the early fall of 1950, two full months into the Korean War, North Korean forces were knocking at the door of Taegu, South Korea, and feelings were running high in the United States against the Soviet Union. Some people felt that the Soviets, if not outright instigators of the war, were at least in a position to compel the North Koreans to desist. High administration officials began to talk of preventive war against the Soviet Union, and President Truman was determined to squelch it.

In this context, the outspoken General Anderson, then commander of the Air War College (AWC) at Maxwell Air Force Base, Alabama, granted an interview on the subject of preventive war to a reporter from the Montgomery Advertiser. The published interview quoted General Anderson as follows: "We're at war, damn it. . . . Give me an order to do it and I can break up Russia's five A-bomb nests in a week. . . . And when I went up to Christ—I think I could explain to Him that I had saved civilization."¹⁰

On 1 September 1950, after reports of General Anderson's remarks reached Washington, Gen Hoyt Vandenberg, the Air Force chief of staff, suspended Anderson from his position at AWC; Anderson subsequently submitted his retirement papers. It is always risky for a military man to venture publicly into the field of war policy vis-à-vis a major national enemy, especially a nuclear-armed enemy. But to do so in apparent opposition to the commander in chief's own announced policy is very likely to be a career ender.

Secretary of the Navy Francis Matthews had made a public speech a week earlier advancing a similar thesis. In an interesting commentary on the differential treatments often accorded civilian and uniformed officials, a contrite Secretary Matthews was able

to survive the ensuing flap by convincing the president that he (Matthews) had been unaware of the full implications of the term preventive war for the administration's policy.¹¹

Maj Gen Jerry D. Page

The relief of General Anderson foreshadowed that of another AWC commander, Maj Gen Jerry Page, 17 years later. During an AWC seminar for senior Air Force Reserve officers in December 1966 in which discussion was classified Secret and understood to be strictly confined behind the closed doors of the classroom, General Page was alleged to have revealed confidential bomb shortages in Vietnam and to have criticized some of the defense policies of Defense Secretary Robert McNamara.

The relief sent a shock wave not only through the AWC faculty but through the faculties of the nation's other senior service colleges (SSC) as well, for it struck at one of the sacrosanct tenets of SSC education—the market place of ideas, in which contending ideas of all stripes can compete freely in give-and-take academic discussion behind the closed doors of the college. Former senator Barry Goldwater later accused one of the seminar attendees, a Reserve colonel and politician recently defeated in his reelection bid for the governorship of Arizona, of having made complaints to the Department of Defense that led to General Page's relief and subsequent transfer.¹²

Gen John McConnell, Air Force chief of staff, offered the following explanation: "I personally reassigned him of my own volition because I was unhappy at some of the forums he conducted."¹³ The chief thus unintentionally raised the question of how he learned the contents of such closed forums in the first place. General Page was reassigned to air-division command in Okinawa, "without prejudice" according to the announcement. But he never received a third star despite his reputation as one of the "ablest thinkers" in the Air Force.

Gen Michael J. Dugan

Of all the freedom-of-speech cases involving high-ranking military leaders, that of General Dugan is, to me at least, one of the most troublesome. On taking up the reins as chief of staff of the Air Force in the summer of 1990, General Dugan announced publicly that he wanted senior Air Force officers to be more open with reporters: "I think that the leaders . . . need to be upfront, they need to take the gaff that goes with it."¹⁴

This policy of openness would prove his undoing. In September 1990 during a tour of US forces deployed in the Gulf preparatory to Operation Desert Storm, General Dugan took the risky step of making himself and five senior generals of the Air Staff available for press interviews focused on US strategy, with particular emphasis on the prominent role to be played by air power. The resulting story made front-page news in the Washington Post on Sunday, 16 September 1990, with the headline reading "U.S. to Rely on Air Strikes If War Erupts."¹⁵

In his autobiography *My American Journey*, Colin Powell, chairman of the Joint Chiefs of Staff, summed up what he regarded as the objectionable positions expressed by General Dugan during the interviews: "Among the things Dugan was quoted as saying in the Post article were that 'airpower is the only answer that's available to our country'; that the Israelis had advised him 'the best way to hurt Saddam' was to target his family, his personal guard, and his mistress; that Dugan did not 'expect to be concerned' with political constraints in selecting bombing targets; that Iraq's air force had 'very limited military capability'; and that its army was 'incompetent.'"¹⁶

The next day, Secretary of Defense Dick Cheney peremptorily relieved Dugan, charging the general with "lack of judgment" in disclosing "operational details" and in addressing "decisions that may or may not be made by the president in the future."¹⁷

I do not intend to defend General Dugan's comments other than to note that President George Bush himself, when queried by reporters, replied that he "was not concerned

that the revelations caused any increased danger to U.S. troops."¹⁸ He doubtless realized that combat-savvy General Dugan, whose air men would literally live or die by intelligence and counterintelligence during the coming encounter, would have a far better appreciation of operational security than the secretary. Rather, my concern is the one expressed by General Powell to Secretary Cheney, when the secretary told him of the contemplated firing: "Let's make sure the punishment fits the crime."¹⁹ I don't believe it did.

General Dugan was anything but insubordinate or rebellious. He was a plain-spoken fighter pilot who, after earning a Silver Star and Purple Heart in Vietnam, toiled within the system and rose steadily through a succession of important staff and command billets to become the nation's top airman. As a relative newcomer—he had been Air Force chief for only three months at the time of the interviews—undercutting war preparations or bucking the secretary of defense and his commander in chief would have been the last thing on his mind. Once he became convinced that General Dugan had fouled up seriously in his public remarks, Secretary Cheney needed to do no more than take the general behind closed doors and read the riot act to him. It was not necessary to humiliate General Dugan before the world; it was not necessary to destroy an exemplary military career of 32 years.

We may close this sad episode by noting several ironies in Secretary Cheney's pattern of stewardship at the Pentagon. In Colin Powell's characterization, Cheney was a "man who had never spent a day in uniform, who, during the Vietnam War, had gotten a student deferment, and later a parent deferment." Yet, in March 1989, with no previous defense-related experience and less than a week on the job as defense secretary, Cheney at a televised press conference excoriated Air Force Chief of Staff Larry Welch for discussing MX missile deployment options with Congress. Had Cheney scrupled to discuss the matter with Welch before publicly dressing him down, he would have learned, according to Powell, that both Deputy Defense Secretary William Taft and National Security Advisor Brent Scowcroft had already author-

ized Welch to speak with congressional members. In Powell's view, Cheney's touchy hyperreaction to perceived transgressions of authority by the brass was a reflex of his own private anxieties over his lack of direct experience in military affairs. He had to prove he could stand up to the generals.²⁰

A final irony in this problematic tale of excessive operational and politico-military candor emerges from allegations by Benjamin Schemmer, respected former editor of *Armed Forces Journal*. Schemmer claims that serious leaks of classified information contained in Bob Woodward's book *The Commanders* (Simon & Schuster, 1991)—an account of US military decision making during the two years prior to the Persian Gulf War—must have come directly from Secretary Cheney, among others.²¹

Moreover, people with long memories will recall that in April 1989 Secretary Cheney, after scarcely a month in office, angered President Bush by predicting during a television interview that Soviet president Mikhail Gorbachev's national reforms were doomed to failure, at the very time when President Bush was desperately trying to prop up the Soviet leader by taking a positive public view of his prospects.²² Secretary Cheney was fortunate to have a boss who was secure and understanding in response to his subordinate's public relations miscue. General Dugan was, of course, less fortunate. Those who followed Cheney's years in the Pentagon's top job will likely judge that he was an able and effective secretary of defense, and I believe they are right. But there is little denying that he carried psychological baggage into his position which obscured to himself his own fallibility and clouded his judgment in dealing with uniformed leaders like General Dugan who misstepped while negotiating the notoriously treacherous minefields of news-mediate relations.

Maj Gen Harold N. Campbell

Article 88 of the UCMJ reads as follows: "Any officer who uses contemptuous words against the President, Vice President, Congress, Secretary of Defense, or a Secretary of a Department, a Governor or a legislature of

any State, Territory, or other possession of the United States . . . shall be punished as a court-martial may direct."²³

As speaker at the 32d Fighter Group's maintainers-of-the-year awards banquet on 24 May 1993 near Soesterberg Air Base in the Netherlands, General Campbell referred to President Bill Clinton as "draft-dodging," "pot-smoking," and "womanizing," which were, of course, contemptuous words in anybody's lexicon. Campbell's remarks were apparently intended as a humorous preface to his prepared remarks, but some of the attendees thought they were anything but funny and reported them up the chain.²⁴

President Clinton told reporters he was not offended personally by the remarks, but that "for a general officer to say that about the Commander in Chief . . . is a very bad thing."²⁵ However, the White House was not anxious to see the public court-martial of a distinguished combat veteran on such charges—General Campbell's war record included one thousand combat flying hours in Vietnam plus award of the Silver Star and five Distinguished Flying Crosses. Offered nonjudicial punishment under UCMJ Article 15 in lieu of a court-martial, General Campbell decided to accept it, receiving a permanent written reprimand and a fine equivalent to a month's pay. Though told to put in his retirement papers, he retained his major general's rank.

Gen Ronald Fogleman

Late May 1997 was not a propitious time for senior Air Force officials to be appearing before a congressional committee seeking money, for the Lt Kelly Flinn sexual extravaganza was in full heat on all the nation's TV screens and newspaper front pages. When General Fogleman, Air Force chief of staff, appeared before the Defense Subcommittee of the Senate Appropriations Committee on 21 May to testify on proposed budget estimates for Air Force programs in fiscal year 1998, he was ambushed by Sen. Tom Harkin (D-Iowa), who, preferring to talk instead about the



Former secretary of defense Dick Cheney (seated, third from left). In Powell's view, Cheney's touchy hyperreaction to perceived transgressions of authority by the brass was a reflex of his own private anxieties over his lack of direct experience in military affairs.

Flinn affair, he rated him for the "overly moralistic legal code in the Air Force."²⁶

This put General Fogelman in a real bind. The Air Force, worried about inciting charges of command influence like those afflicting the Army in the Aberdeen Proving Ground cases, had played by the rules and generally confined its public statements on the planned court-martial of Lieutenant Flinn to a few terse announcements by public affairs officials. Lieutenant Flinn, her family, and civilian lawyer, by way of stark contrast, had taken their case to the news media in the most aggressive manner possible, waging an increasingly successful campaign to woo public and congressional sympathies by portraying her as a victim. Political pressures were building to the point that it was becoming problematic whether the Department of the Air

Force would be allowed to dispose of the case independently.

Such was the setting when Senator Harkin challenged General Fogelman during hearings not remotely connected to the Kelly Flinn case. Under the rule of candor that Congress perennially urges upon military witnesses, General Fogelman responded frankly. Denying that the basic issue was adultery, he went on to state that "this is an issue about an officer entrusted to fly nuclear weapons who disobeyed an order, who lied. That's what this is about."²⁷

The response from Flinn's defenders was swift, sure, and absolutely predictable. Sen. Slade Gorton (R-Wash.), conveniently overlooking the mandate for candor normally applicable to military witnesses in their responses before Congress, went on NBC's

Morning Show two days later to denounce General Fogleman's testimony. In obvious high dudgeon, he complained that as a result of Fogleman's remarks, it was "impossible" for Lieutenant Flinn to get a fair trial. And how should General Fogleman have responded? According to Senator Gorton, "he should have kept his mouth shut!"²⁸ In other words, it was perfectly all right for Lieutenant Flinn to go outside the courtroom and try her case publicly and politically, but the Air Force chief must remain mute as a stone, even when pressed for the truth by one of Gorton's fellow senators.

The problem of command influence in military justice is real and must never be taken lightly. But General Fogleman's response to Senator Harkin, considering the unique circumstances, was not only necessary and proper—it was a laudable act of courage.

On 28 July 1997, some two months after the Kelly Flinn affair was put to rest by her resignation and a year before his normal four-year term would have expired, General Fogleman abruptly resigned his position as Air Force chief and announced his retirement. In a message to the troops explaining his decision, General Fogleman said simply, "I do not want the Air Force to suffer for my judgment and convictions." Most prominent among the reasons given for his resignation was his objection to the impending disciplining by Defense Secretary William S. Cohen of an Air Force commander in Saudi Arabia for failure to take adequate security precautions in advance of the terrorist bombing of the Khobar Towers housing complex in Dhahran. Another factor in the strained relations between the general and his civilian bosses was their unhappiness with what they viewed as his penchant for expressing his professional frustrations so openly that "they often found their way into news accounts."²⁹

The roster of Air Force officers discussed above by no means exhausts the list of US military leaders whose exercise of supposed First Amendment rights brought them into widely publicized conflict with their superiors. Among the celebrated cases of leaders from other services who took their knocks

were Army generals Leonard Wood, Douglas MacArthur, George Patton, Matthew Ridgway, Edwin Walker, and John Singlaub, plus Navy admirals Louis Denfeld, Hyman Rickover, and most recently, Richard Macke.³⁰ Examination of such cases permits us to arrive at several commonsense axioms governing the public statements of career Air Force professionals. Although many of these axioms may strike the reader as self-evident, it is astonishing how often they have been violated, even by otherwise sophisticated leaders.

- Follow the regulation on public information. Hew faithfully to clearance procedures for speeches and publications set down in Air Force Instruction 35-205, Air Force Security and Policy Review Program. This instruction requires, among other things, that material intended for public release having high-level military, national, or foreign policy implications be reviewed for "security and policy consistency." Unlike the Army's review agency, the Air Force Office for Security Review does not review specifically for "propriety," but in practice, propriety issues fit well enough under the broad rubric of policy.³¹
- Stick to the approved text. Once a text is cleared, make sure you adhere to it in the presentation. Beware of off-the-cuff departures from approved text, flights of wit, or excursions into politically sensitive territory. Make the organizational public affairs officer an active partner and advisor throughout the composition-clearance-delivery cycle.
- Know the ground rules. Before speaking, personally establish or confirm ground rules between you and your audience or interviewer as to whether what you say can be attributed to you in the news media. If the rules of the primary presentation differ from those of the question-and-answer period, make sure that everyone present is informed of the distinction. Never assume that because the audience is mostly uniformed, you can safely flout the guide lines for pub-

- lic discourse. The more publicly recognizable your name, the greater the likelihood a reporter will be present.
- Don't answer inappropriate questions or those too hot to handle. Never in your zeal to be honest and candid feel that it's somehow dishonorable or cowardly to refuse to tackle a question.
 - Stick to defense matters and your areas of expertise. Confine your public utterances to defense matters, particularly those that lie specifically within your area of responsibility and competence. In practice, at the highest levels, it is often difficult to separate military issues from nonmilitary, but you must keep the ideal constantly in mind as you speak.
 - Never express contempt toward civilian higher-ups. Keep in mind the existence of Article 88 of the UCMJ, which prohibits the use of contemptuous words against the president, vice president, Congress, the secretary of defense, and so forth. To violate this article, even lightheartedly or in jest, is simply to ask for trouble.
 - Avoid sensationalist prophecy. Unless you own a certified crystal ball, resist the temptation to electrify audiences with horrific visions of future calamity or to seduce them with rosy prospects of impending nirvana. Prophecy can make fools of us all. Despite earlier demonstrations to the contrary by Billy Mitchell, Rear Adm Clark Woodward declared in 1939, only two years before Pearl Harbor, that "as far as sinking a ship with a bomb is concerned, you just can't do it." Adm William Leahy, mercifully behind closed doors, declared to President Truman in early 1945—the year of Hiroshima and Nagasaki—that the attempt to build an atomic bomb "is the biggest fool thing we have ever done. . . . The bomb will never go off, and I will speak as an expert in explosives."³²
 - Don't rely on your "rights" to protect you. In contemplating making a risky public statement, don't occupy yourself overmuch with your legal rights or what the

courts might do in your behalf. Of all the US officers mentioned above whose careers were damaged or ruined by errant words, only Billy Mitchell was actually court-martialed. Save for the lucky few like Adm Hyman Rickover, who enjoyed a powerful constituency in Congress that protected him from reprisal, the bureaucracy can easily find other ways to take its revenge on an officer who ignores the rules.

- As you rise in rank, your words attract correspondingly greater attention. As a general rule, the higher officers rise in military rank and position, the more considered they must become in their public utterances. Peons rarely make news with what they say, but let a general misspeak, and reporters will beat a path to his or her door.
- Don't wait until you need finesse in public utterance to begin acquiring it. Related to the prior point, as part of your continuing professional preparation, consciously develop a sensitive ear for what you can publicly say and how to say it. If you wait until you're on the hot seat, it will be too late. It is astounding how great commanders vary in this regard. General Patton found it practically impossible to speak long to reporters without somehow generating an international contretemps. By way of contrast, Gen Norman Schwarzkopf could extemporize at length before daily internationally televised news conferences, maintaining this practice for an entire campaign without once losing his footing. Skill in communicating through the media without inflaming the world is not a mark of effeminacy or slick self-promotion. It is a plain, simple prerequisite for rising military leaders, no matter how much they covet their warrior image.
- Distinguish between personal opinion and official policy. If for whatever reason you choose to take a public position at odds with announced policy, always warn your auditors that you are expressing a

personal opinion, not an official position. Even then you are not necessarily on firm ground because if your rank and position are sufficiently high, you essentially have forgone the luxury of public independence of view. Once officers sign on to the joint chiefs or as military advisors to the National Security Council, for example, they have joined the administration "team" and will thereafter be expected to keep their dissents in-house.

- Be frank with Congress but stress the administration's position. Testifying before Congress presents the biggest challenge of all. The administration will want you to hew to its line regardless of your real convictions, while congressional committee members will want to know your real convictions regardless of the administration line. Despite the loyalist philosophy of respected World War II leaders like Gen Omar Bradley and Gen George Marshall, who chose as a matter of principle never to take public issue with their commander in chief, the demands of Congress in its legislative and investigative functions have led to a moderation of such hard positions. Though specific policies may vary with the administration, there has been a general gravitation toward the following approach: officers are expected to testify first as to established policy and their intention to carry it out; then, if asked for their personal opinion, they may express it but must note that it is their own and not the administration's.³³

The foregoing axioms, if applied with judgment and discretion, can enable today's air professionals to profit from the experience of their predecessors. It is important to realize, however, that no such set of rules can ever dissolve entirely the basic tension inherent in the dual identity of soldier-citizens. As members of the armed forces, they must continuously be mindful of the limitations upon their right to free speech, accepting infringe-

ments necessary to protect classified information; assure operational security; promote good order and discipline; support the chain of command in accomplishing the assigned mission; and foster loyalty, cohesion, and team spirit in furtherance of the Air Force's institutional goals and those of the armed forces—in short, defend the Constitution and discharge the duties of their military office.

As patriotic citizens of a democratic country, however, they must be mindful of the surprisingly extensive areas in which they can exercise free speech, making the fruits of their special, professional expertise available to citizens at large so that Congress, which passes laws touching our national security, and voters, who elect the Congress, can act with the full benefit of the politically impartial and technically informed perspective of airmen.

In mediating the often conflicting impulses toward soldierly reticence, on one hand, and citizenly candor, on the other, air professionals may seek assistance to some extent in explicit official guidance—for example, security regulations and Article 88 of the UCMJ. But there remains a vast gray area of "policy" issues regarding which the service and the administration will naturally strive for conformity to their approved lines, as opposed to the individual member's natural bent toward his or her own line. The result can be a welter of conflicting interests, obligations, and values as reflected within the same individual: career advancement versus disinterested professionalism; service interests versus those of the nation and the people; loyalty to the administration versus obligation to Congress; service ideals versus joint ideals; and so forth.

In resolving such internal conflicts successfully, air professionals, each in his or her own way, must ultimately depart the realm of rules and enter the realm of conscience. They must set aside for the moment the ideal of physical courage and bring to the fore the ideal of moral courage. They must downplay the value of prudential insight and elevate the value of ethical clarity.

Paradoxical as it sounds, in order to guarantee the freedoms of all Americans, we as a nation must reduce the freedoms of some Americans—specifically, the favored few who bear arms to defend us. But reducing the freedoms of this favored few is a far cry from abolishing them, as the courts have consistently upheld. So far as freedom of speech is concerned, it is reduced for the service member only in particular contexts, and then only to the minimal degree essential for the successful performance of the military function. In other contexts, one should prize free speech for the service member just as highly as for any citizen.

It is free speech that permits vigorous debate among service members on the proper course of action up to the point when the decision is made. It is free speech that permits them to render honest professional military advice to their civilian masters in the chain of command. It is free speech that permits them to propound innovative professional ideas in military journals. It is free speech that enables them to provide to Congress and the American voters an expert and impartial profes-

sional military perspective. An air force that fails to make such liberal provision for free speech among its members will be a retrograde and regressive force, and the nation that hazards its security on such a force will be casting its lot with immobilized minds and imaginations.

As the case histories presented earlier clearly reveal, air professionals will seldom be able to reconcile completely the sometimes conflicting demands of free expression and institutional discipline. When such conflict occurs, they will face a choice between two courses: they can act according to service rules, accepting the resulting infringement of speech, or they can go ahead and speak out, accepting the resulting risk to their careers. In choosing between the two, they should be guided by the principle that their First Amendment rights to free speech can be properly infringed only by the compelling voice of military necessity. If during the course of their careers they have cultivated such qualities as moral courage, ethical clarity, and a robust professional conscience, they should have little difficulty in arriving at a proper decision. □

Notes

1. Michael A. Brown, "Must the Soldier Be a Silent Member of Our Society?" *Military Law Review* 43 (1969): 71-109 (particularly 72-75). See also Donald N. Zillman, "Free Speech and Military Command," *Utah Law Review*, no. 3 (1977): 423-56 (particularly 429); Cathy Packer, *Freedom of Expression in the American Military* (New York: Praeger, 1989), 81; Ronald N. Boyce, "Freedom of Speech and the Military," *Utah Law Review*, May 1968, 240-66 (particularly 253); and Felix F. Moran, "Free Speech, the Military, and the National Interest," *Air University Review*, May-June 1980, 106-13.

2. Boyce, 241; Brown, 80-81; Detlev F. Vagts, "Free Speech in the Armed Forces," *Columbia Law Review* 57 (1957): 187-218 (particularly 203); and Zillman, 438. U.S. v. Voorhees, 4 US Court of Military Appeals (USCMA) 509 (1954) and U.S. v. Priest, 21 USCMA 564, 45 CMR 338 (1972), establish and refine service members' speech rights under the First Amendment, but they do not define precisely how far the services can go in restricting speech on grounds of policy and propriety.

3. Vagts, 191.

4. For an excellent discussion of this tension, see Edward L. Katzenbach Jr., "Should Our Military Leaders Speak Up?" *New York Times Magazine*, 15 April 1956, 17, 36, 39.

5. The following sketch of Billy Mitchell's career and court-martial is based principally upon Burke Davis, *The Billy Mitchell Affair* (New York: Random House, 1967).

6. *Ibid.*, 218.

7. An interesting sidebar to the court-martial of Mitchell was the role of his friend and court-martial panelist Brig Gen Douglas MacArthur, who would encounter his own free-speech problems with an American president 25 years later. MacArthur's vote on the question of Mitchell's guilt has become the focus of a great deal of scholarly and historical scrutiny. Most accounts allege that MacArthur voted for acquittal, as he himself suggested in a letter to Sen. Alexander Wiley of Wisconsin in 1945 and in his *Reminiscences*. But MacArthur also wrote in *Reminiscences*, "That [Mitchell] was wrong in the violence of his language is self-evident" (Davis, 327, note; and Douglas MacArthur, *Reminiscences* [New York: McGraw-Hill, 1964], 85-86). The issue may turn on the supposition that there were numerous votes—not just one—as the court dealt individually with the eight charges and the sentence. One might conjecture that MacArthur did vote against conviction on a charge or two and that during the sentencing deliberations, voted against outright dismissal. D. Clayton James provides the most balanced and judicious survey of the evidence, concluding, "In the final analysis, the only assertion that can be made with certainty about his vote is that it will never be determined for certain" *The Years of MacArthur*, vol. 1, 1880-1941 [Boston: Houghton Mifflin, 1970], 310-11). In still another strange intertwining of fates, we may note the role of court-martial panelist Maj Gen Charles P. Summerall, a hero in three wars whose rank entitled him to be president of the court but who was challenged off by Mitchell's counsel, with much accompanying acrimony. He was later called as a prosecution

witness, in which role his hostility to Mitchell became fully evident (Davis, 240-42, 315-16). As D. Clayton James observes, MacArthur would not have wanted to antagonize his old comrade Summerall, who was a leading favorite to become Army chief of staff and in fact did so the following year (James, 309-10). In a delicious stroke of irony, Summerall, on becoming Army chief, was himself silenced by the resolute Coolidge for expressing vigorous public opposition to the president's proposed cuts in military spending. See "Gen. Summerall Is Dead in Capital," *New York Times*, 15 May 1955, 87.

8. Davis, 343.

9. Foremost among these was Mitchell's great Italian counterpart Giulio Douhet—often called the "Mahan of airpower"—who during World War I was court-martialed, imprisoned for a year, and then retired for his published attacks on the Italian general staff's air policies. But after the Italian defeat at Caporetto in 1917 revealed the truth of his criticisms, he was recalled to active duty as the head of the aviation service and later rose to the rank of major general *Encyclopedia Britannica*, 1973 ed., s.v. "Douhet, Giulio"). Another example was Maj Henry Arnold. Mitchell's close friend "Hap" Arnold, whose bona fides as an aviation pioneer were more impressive even than Mitchell's, was also the author of several articles and books presenting the case for airpower. Not long after the court-martial of Mitchell, whom Arnold had supported during the proceedings at great professional risk, it was learned that Arnold had been feeding "airpower propaganda" to friendly newsmen and radio commentators, in contravention of General Staff orders to the air spokesmen to cease and desist. His boss gave him the choice of court-martial or resignation, but when Arnold chose the former, he was instead exiled to Fort Riley, Kansas, then an obscure cavalry post. Chastened but wiser from this lesson in service politics, Arnold persevered, moving beyond the role of mere airpower advocate to that of institution builder. He eventually oversaw the assemblage of the greatest air force in history and earned five stars. See Carl H. Builder, *The Icarus Syndrome: The Role of Air Power Theory in the Evolution and Fate of the U.S. Air Force* (New Brunswick, N.J.: Transaction Publishers, 1994), 51-54; and Thomas M. Coffey, *Hap: The Story of the U.S. Air Force and the Man Who Built It* (New York: Viking Press, 1982), 125-26. Of leap ahead some 40 years to 1959, when Gen Thomas Power headed Strategic Air Command during the feverous days of the cold war. In April of that year, he submitted for clearance his book manuscript titled *Design for Survival*, a powerfully argued advocacy of overwhelming nuclear strength as the best guarantor of peace. Secretary of Defense Neil McElroy forbade publication, however, so long as Power remained on active duty. Power complied, and not until 1964, following his retirement, did he proceed with publication of the book. See Thomas S. Power with Albert A. Arnheim, *Design for Survival* (New York: Coward-McCann, 1964), 11-12.

10. Austin Stevens, "General Removed over War Speech," *New York Times*, 2 September 1950, 1, 8.

11. Harry S. Truman, *Memoirs*, vol. 2, *Years of Trial and Hope* (Garden City, N.Y.: Doubleday, 1956), 383.

12. Hanson W. Baldwin, "Air War College Chief Ousted after Talks on Bomb Shortage," *New York Times*, 27 January 1967, 1, 3; and idem, "Shift of General Page Arouses Fear of War College Faculty," *New York Times*, 17 February 1967, 15. See also Timothy E. Kline, "Where Have All the Mitchells Gone?" *Airpower Journal* 11, no. 3 (Fall 1997): 74-75; "Goddard Disclaims Scoring of General," *New York Times*, 3 February 1967, 34; "Air Force Names War College Head," *New York Times*, 7 February 1967, 25; and "Pentagon Crackdown on a Critic?" *U.S. News & World Report*, 6 February 1967, 8.

13. Baldwin, 1, 3.

14. R. Jeffrey Smith, "Chief of Air Staff Fired by Cheney," *Washington Post*, 18 September 1990, A1, A25.

15. Rick Atkinson, "U.S. to Rely on Air Strikes If War Erupts," *Washington Post*, 16 September 1990, A1, A36.

16. Colin L. Powell with Joseph E. Persico, *My American Journey* (New York: Ballantine, 1995), 463.

17. Smith, A1, A25. For the most complete and authoritative accounts of General Dugan's relief, see Bob Woodward, *The Commanders* (New York: Simon & Schuster, 1991), 290-96; and Powell, 463-65. The idea for the dismissal and the final decision were Cheney's, though he obtained advance concurrence from the president.

18. Smith, A25.

19. Powell, 465.

20. Ibid., 393. Still another irony lies in Cheney's contrasting style in dealing with a public relations gaffe by Army lieutenant general Calvin Waller, deputy commander of US Central Command during the Gulf War. Having been in-theater only a month, with little experience dealing with the media, General Waller, on being pressed by reporters, candidly told them at a news conference in Riyadh, Saudi Arabia, in December 1990 that ground forces wouldn't be ready to attack before mid-February, thus contradicting President Bush's emphatic public stance that US forces were prepared to attack at any time. The public affairs staff spent the entire night "exercising damage control." However, as Gen Norman Schwarzkopf tells the story, Secretary Cheney, who was in Riyadh at the time, seemed unconcerned, even quipping, "It's not always bad to send the enemy mixed signals." See H. Norman Schwarzkopf with Peter Petre, *General H. Norman Schwarzkopf, the Autobiography: It Doesn't Take a Hero* (New York: Bantam, 1992), 394-95.

21. Benjamin F. Scherer, review of *My American Journey* by Colin L. Powell, in *Strategic Review* 44 (Winter 1996): 62.

22. "Cheney, Richard B(ruce)," *Current Biography Yearbook 1989* (New York: H. W. Wilson, 1989), 106.

23. As quoted in James Snedeker, *Military Justice under the Uniform Code* (Boston: Little, Brown, 1953), 751.

24. For details of the incident, see Neff Hudson, "General Is Forced to Retire over Clinton Comments," *Air Force Times*, 28 June 1993, 4; and Susanne M. Schafer, "Officer Who Blasted Clinton Disciplined," *Patriot-News* [Harrisburg, Pa.], 19 June 1993, A10.

25. Hudson, 4.

26. Elaine Sciolino, "Air Force Chief Has Harsh Words for Pilot Facing Adultery Charge," *New York Times*, 22 May 1997, 1.

27. Ibid.; and Dana Priest and Tamara Jones, "Ex-Wife Wants Court-Martial for Pilot," *Washington Post*, 22 May 1997, A3.

28. NBC Morning Show, 23 May 1997.

29. Bradley Graham, "Air Force Chief of Staff Abruptly Resigns Post," *Washington Post*, 29 July 1997, A1, A12. See also Eric Schmitt, "Citing Investigation, Top General Seeks to Leave Air Force," *New York Times*, 29 July 1997, 1, 13; Julie Bird, "Air Force Chief Fogelman Steps Down," *Army Times*, 11 August 1997, 10; and Jack Weible, "Cohen Faults Schwalier in Bombing," *Army Times*, 11 August 1997, 11.

30. For a comprehensive treatment of the important twentieth-century free-speech cases involving career professionals from all services, see my study *The Professional Officer and the First Amendment* (1997) in the holdings of the US Army Military History Institute, Carlisle Barracks, Pa. I adapted the present article from the portion of this study that deals with Air Force leaders.

31. Air Force Instruction (AFI) 35-205, *Air Force Security and Policy Review Program*, 25 February 1994, pars. 4 and 7. See also Air Force Policy Directive (AFPD) 35-2, *Public Communications Programs*, 12 November 1993; and Army Regulation 360-5, *Public Information*, 31 May 1989, pars. 3-1.a., 4-1.d. and e., and 4-2. a. (2).

32. Quoted by David Wallechinsky, in "Bad Predictions," *Parade Magazine*, 10 September 1995, 16.

33. See Vagts, 206-10; Zillman, 425, n. 12; and Moran, 112. AFI 35-205 does not address testimony by Air Force officers before congressional committees. Instead, see Department of Defense Directive 5400.4, *Provision of Information to Congress*, 30 January 1978; and AFD 90-4, *Relations with Congress*, July 1993.

INTERNET DOCUMENT INFORMATION FORM

A . Report Title: The Speech Rights of Air Professionals

B. DATE Report Downloaded From the Internet 12/1/98

C. Report's Point of Contact: (Name, Organization, Address, Office Symbol, & Ph #): Department of the Air Force
Airpower Journal
401 Chennault Circle
Maxwell AFB, AL 36112-6428
(334) 953-5322/6629

D. Currently Applicable Classification Level: Unclassified

E. Distribution Statement A: Approved for Public Release

**F. The foregoing information was compiled and provided by:
DTIC-OCA, Initials: VM_ Preparation Date: 12/01/98 __**

The foregoing information should exactly correspond to the Title, Report Number, and the Date on the accompanying report document. If there are mismatches, or other questions, contact the above OCA Representative for resolution.